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The role of competition policy in promoting sustainable and inclusive growth

Note by the UNCTAD secretariat

Executive summary

Competition enhances efficiency, promotes innovation and leads to wider product choice and better quality, thereby improving consumer welfare. Competition policy may play a significant role in achieving sustainable and inclusive growth and development. This note looks into how competition policy and law could foster such goals.

Competition policy, if appropriately designed and effectively implemented according to the economic, social and environmental circumstances in a country, is expected to complement other government policies in achieving sustainable and inclusive growth and development. For this purpose, prioritization of those sectors that are most crucial to the people and economy of a country is important. Exemption of certain agreements and practices in agriculture, such as farmers' cooperatives, may improve smallholder producers' efficiency and income, thereby enhancing their standards of living. Another significant factor in policy design is to consider both free and fair competition as two pillars of competition policy. Effective competition law enforcement and advocacy play a key role in realizing sustainable and inclusive development through the elimination and deterrence of anticompetitive practices. Further, applying exemptions to business agreements that promote economic progress, environmental protection and green technologies and products from competition law enforcement are necessary to advancing sustainable development goals.

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I. Introduction

1. It is widely accepted that a nation's development cannot be achieved solely by gross domestic product growth, but instead can only be achieved by a comprehensive and integrated agenda of environmental, social and economic policies and instruments. By identifying the linkages, complementarities and frictions between these three policy areas, growth may be achieved in the long term that is both inclusive and equitable and also environmentally responsible. This issue is neatly laid out in the Synthesis Report of the Secretary-General on the post-2015 sustainable development agenda, as follows:[1]

> Sustainable development must be an integrated agenda for economic, environmental and social solutions. Its strength lies in the interweaving of its dimensions. This integration provides the basis for economic models that benefit people and the environment; for environmental solutions that contribute to progress; for social approaches that add to economic dynamism and allow for the preservation and sustainable use of the environmental common; and for reinforcing human rights, equality and sustainability. Responding to all goals as a cohesive and integrated whole will be critical to ensuring the transformations needed at scale.

2. Member States of the United Nations have been negotiating the contents of the post-2015 sustainable development agenda since January 2015 under the auspices of the United Nations General Assembly. The post-2015 agenda is expected to be transformative, that is, it should transform economies, societies and the ways to tackle climate change with a view to making "patterns of growth more inclusive, sustained and sustainable".[2] These intergovernmental negotiations are expected to conclude by the end of July 2015 and to present a set of sustainable development goals and means of implementation necessary for achieving them. In this framework, at the national level, Governments will need to integrate these goals into their policies and laws and take measures towards achieving them. This note explores the role of competition law and policy within this integrated approach.

3. One of the fundamental aims of competition policy and law is to increase competitive market pressures. When these pressures are lacking in markets, especially in the presence of monopolies and cartels, higher prices, lower quality products and economic injustice will prevail.[3] This may have particularly strong effects on the poorest or most vulnerable consumers if these markets are tasked with the provision of basic goods.

4. By correcting market failures, effective competition policies may lead firms to become more efficient, increase innovation and widen consumer choice and product quality.[4] Further, as outlined in one study, these conditions may also lead to firms producing healthier, safer, environmentally responsible and more ethical and equitable products, in order to satisfy the demands of more discerning and conscientious consumers.[5] Proponents of competition policy would argue that, as well as fostering economic growth, this is indicative of its role in supporting equitable outcomes, alleviating poverty and indirectly promoting sustainable and inclusive development. Further, the alignment of

[1] A/69/700.
[2] Ibid.
[3] TD/B/C.I/CLP/24/Rev.1.
[4] TD/B/C.I/CLP/27.
[5] MW Gehring, 2003, *Sustainable Competition Law*, presented at the fifth session of the Ministerial Conference of the World Trade Organization, Cancun, Mexico, 10–14 September.

business practices, especially those of big business, can play a central role in determining the development path of a nation.[6]

5. One study suggests that sustainable competition law must address social and environmental concerns and cannot focus solely on economic issues.[7] Further, in order to use competition law to promote sustainable and inclusive development, the study emphasizes the need for the identification of appropriate environment and development objectives, their links to international competition rules and the appropriate mechanisms in relation to the specific context of the affected country.

6. Another study highlights the similarities of environmental and competition policies in identifying and correcting market failures, although the former target environmental externalities and the latter increased economic performance.[8] For example, if an economy and the majority of its stakeholders are to truly benefit from the market economy and a liberalization of trade, certain redistribution mechanisms must be imposed on the market. Similarly, in order to promote an environmental agenda, similar mechanisms will be used. With obvious implications for the holistic approach to sustainable and inclusive policies, the paper emphasizes that although they share similarities, the tools used to enforce and enact environmental policy may directly oppose competition policy.

7. In this respect, another study outlines the importance of good governance, and particularly openness, accountability and monitoring, if competition policy enforcement is to be successfully coupled with effective environmental management.[9]

8. An examination conducted by the Nordic Competition Agencies on the linkages between environmental and competition policies emphasizes the importance of effective competition for environmental growth strategies, as efficient price determination and signals enable effective abatement policies and technological innovation to be implemented.[10] Further, as effective competition is a key factor to innovation within markets, it also influences the ability of markets to achieve environment targets in an efficient and cost-effective manner. Therefore, it is the interaction between these two policies that lead to the optimal achievement of environmental goals.

9. While there seems to be a compelling need for interactive, holistic policies, only a few jurisdictions have competition objectives related to sustainable and inclusive development. As highlighted by one study, the Republic of Korea Fair Trade Commission is tasked with promoting balanced development through the use of competition tools, avoiding concentrations of market power and encouraging open and equitable competition.[11] Another study highlights that South Africa and Spain are among the few countries that specifically include substantive provisions to promote social development and environmental protection, respectively, within their competition laws. The Spanish law lists these factors as reasonable bases for overturning a decision made by competition

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[6] A Chandler, 1990, *Scale and Scope: the Dynamics of Industrial Capitalism*, Cambridge, United States of America: Harvard University Press and A Chandler, F Amatori and T Hikino, eds., 1997, *Big Business and the Wealth of Nations*, Cambridge, Cambridge University Press.

[7] MW Gehring, 2006, Competition for sustainability: sustainable development concerns, in National and European Commission Competition Law, *Review of European Community and International Environmental Law*, 15(2)172–184.

[8] H Pacini, M Diaz and M Dolores, G Valéria and I Benohr, 2013, Environmental and Competitive Performances: An Exploratory Note, *World Competition*, 36(3): 409–424.

[9] Gehring, 2003.

[10] M Virtanen et al., 2010, *Competition Policy and Green Growth: Interactions and challenges*, Report from the Nordic competition authorities, available at http://www.kapping.fo/get.file?ID=9578.

[11] M Wise, 2000, The role of competition policy in regulatory reform: Review of competition law and policy in [the Republic of] Korea, OECD Journal of Competition Law and Policy, 3(2):128–80.

authorities.[12] In South Africa, the integration of competition and social policies in the post-apartheid era was seen as vital for the economic participation of black-owned companies, especially given the prevalence in the economy of a small number of highly dominant firms.[13]

10. At the regional level, one study notes the importance to the current European Union legislative process of environmental and social criteria for government procurement processes.[14] While recognizing the need for increased cooperation across member States of the European Union on these issues, the paper demonstrates the potential for conflict between economic, social and environmental policies by calling on competition authorities to define limits for these criteria insofar as they may contravene Article 101 of the Treaty on the Functioning of the European Union.

II. How competition policy can contribute to sustainable and inclusive growth and development

11. Sustainable and inclusive development is the core concept underlying the post-2015 sustainable development agenda and includes the idea of economic transformation. Appropriate industrial and trade policies are definitely necessary but not sufficient on their own to achieve sustainable and inclusive growth and development. Competition policy should complement these policies if Governments are to achieve such development. Why does competition policy matter? Competition enhances efficiency, promotes innovation and leads to wider product choice and better quality, thereby improving consumer welfare. It also disciplines the behaviour of firms. Lack of competitive rivalry may result in dominant firms seeking to maintain or obtain monopoly rents, which go against the idea of sustainable and inclusive growth and let firms make unfair profits at the expense of consumers and potential competitors. High and anticompetitive profit markups have been found to prevent growth, productivity and employment creation.[15]

12. The case of the steel and chemicals industries in South Africa as illustrated in one study shows this clearly.[16] These industries had been highly concentrated industries composed of national champions that had faced no domestic competitive pressure during the apartheid regime. While they had been among the best performing manufacturing sectors in the country, they failed to supply competitively priced intermediate inputs to downstream industries. The lack of domestic competition in the steel and chemicals industries prevented the establishment of links between the former and the downstream industries in a way that contributed to overall industrial and economic growth and the development of the country.

13. This subsection considers ways in which competition policy and law may contribute to achieving sustainable and inclusive growth and development.

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[12] Gehring, 2006.

[13] S Roberts, 2004, The role for competition policy in economic development: the South African experience, *Development Southern Africa*, 21(1).

[14] T Lübbig, 2013, Sustainable Development and Competition Policy, *Journal of European Competition Law and Practice*, 4(1).

[15] S Roberts, 2010, Competition policy, competitive rivalry and a developmental state in South Africa, in O Edigheji, ed., *Constructing a Democratic Development State in South Africa: Potentials and Challenges*, Human Sciences Research Council Press, Pretoria.

[16] S Roberts, 2007, Patterns of industrial performance in South Africa in the first decade of democracy: The continued influence of mineral-based activities, *Transformation*, 65:4–34.

A. Development of a sound competition policy

14. Achieving sustainable and inclusive growth and development requires a good policy mix that needs to take into consideration the specific economic, social and environmental circumstances of a country. In order to contribute to sustainable development, which encompasses economic, social and environmental dimensions of development processes, such a policy mix would include trade, economic, social and environmental policies. If designed appropriately and implemented effectively, competition policy is another tool that complements these policies in attaining sustainable and inclusive growth.

15. It is important to identify how competition policy may best contribute to sustainable and inclusive development. For this purpose, the process of developing a competition policy should be participatory and engage all stakeholders, including relevant government ministries and other institutions, consumer and business representatives, academia and civil society. This will facilitate policy design that addresses the concerns raised by stakeholders to the extent possible. Having said that, it should be noted that competition policy may address other policy objectives indirectly and to the extent possible.

Prioritization

16. One of the ways in which competition policy can contribute to sustainable and inclusive development is to set priority sectors that are essential for an economy and for poor people. This would allow the competition agency to focus its resources on dealing with possible anticompetitive practices in these priority sectors. For instance, if the policy defines agriculture as a priority sector, this may contribute to the elimination of anticompetitive practices in that sector, thereby ensuring fair prices for consumers and producers, which would then improve their living standards.

17. Further, prioritizing the agricultural sector in competition policy and consequently in competition law enforcement would promote sustainable development. Considering that the majority of the poor in developing and least developed countries live in rural areas and earn their living from agriculture, this may eventually contribute to poverty reduction by enhancing small farmers' productivity and income growth. Effective competition policies might result in better access by small farmers to agricultural inputs such as fertilizers, seeds and agrochemicals. Similarly, competitive downstream markets could help domestic value addition for agricultural commodities.

Exemptions: The agricultural sector

18. Agriculture is a sector that is often subject to special treatment by competition laws and other sectorial laws due to its multi-dimensional nature. Agriculture involves economic activities that have both social and environmental dimensions. It provides livelihood for an important segment of the population in both the developed and developing world. In addition, the weaker bargaining power of smallholder farmers vis-à-vis providers of inputs such as fertilizers and agrochemicals, as well as buyers of their produce, requires special attention in competition policy. To eliminate such an imbalance, farmers organize themselves in cooperatives, which may facilitate collecting, processing and marketing of their products; negotiate prices with buyers on their behalf; enable them to purchase inputs at lower prices; and provide them with access to credit and other financial services. An UNCTAD study on Mexico's agricultural development, which includes an analysis of competition issues in corn production and commercialization in Mexico, recommends the strengthening of existing associations or cooperatives of small corn growers and supporting the establishment of new associations and cooperatives in order to deal with imbalanced

bargaining power vis-à-vis buyers, as well as unequal competition vis-à-vis large corn farms.[17]

19. Many jurisdictions' competition and agriculture laws and regulations include derogations from the application of competition rules to the agricultural sector. In the European Union, competition rules apply to the entire food supply chain, from agricultural production to grocery retail. Competition rules for agricultural products are laid down in Regulation 1308/2013, which is known as the Common Market Organization Regulation and provides for some exemptions.[18] These exemptions allow for cooperation agreements among farmers which aim at increasing efficiency and strengthening the bargaining power of farmers vis-à-vis buyers on the condition that they do not exclude competition, do not impair the objectives of the Common Agricultural Policy or do not engage in price fixing. Exemptions also cover vertical agreements between farmers on one hand and processors and wholesalers on the other, subject to certain conditions. Following the 2013 Common Agricultural Policy reform, new competition rules for the agricultural sector were introduced. These rules allow producers of olive oil, beef and veal and arable crops to jointly sell/commercialize their products through producer organizations subject to certain conditions, including increased efficiency in production and certain thresholds for the volumes marketed by these organizations.[19]

20. The United States of America has a similar exemption for the agricultural sector. The Clayton Antitrust Act of 1916 authorizes farmers to set up cooperatives "for the purpose of mutual help".[20] The Capper-Volstead Act of 1922[21] clarifies the mutual help to be extended to farmers through cooperatives and the legitimate objectives of such cooperatives, as "collectively processing, preparing for market, handling and marketing" the agricultural products of its members for their mutual benefit.[22] However, farmers cooperatives are not immune from the application of competition law where these organizations engage in anticompetitive activities to the detriment of consumers.

21. Some countries, such as France and Sweden, have explicit provisions in their competition laws exempting agricultural cooperatives or associations from the prohibition under their competition laws, whereas many developing countries do not have such explicit exemption provisions in their competition laws for any specific sector.[23]

Complementarity

22. Competition policy is an essential policy and complements other government policies in achieving sustainable and inclusive growth and development. On the environmental dimension of sustainable development, no one would deny the need for research and development, eco-innovation and eco-friendly technologies. Competition policy may be designed so as to promote such businesses while environmental policy may provide incentives to eco-friendly production processes, green sectors and products. However, such policies or incentives should neither be used as disguised protectionism nor

[17] UNCTAD, 2014, *Mexico's Agricultural Development: Perspectives and Outlook* (New York and Geneva, United Nations publication).

[18] See http://ec.europa.eu/competition/sectors/agriculture/overview_en.html.

[19] Ibid.

[20] § 6 Clayton Act, 15 U.S.C. §17, available at http://gwclc.com/Library/America/USA/The%20Clayton%20Act.pdf.

[21] Capper-Volstead Act, 1922, 7 U.S.C. §291.

[22] A Reich, 2006, The Agricultural Exemption in Antitrust Law: A Comparative Look at the Political Economy of Market Regulation, and A Reich, 2007, Bar Ilan University Pub. Law Working Paper No. 06-7, Texas International Law Journal, 42(843), available at http://ssrn.com/abstract=944389.

[23] Article 4 of Chapter 2 of the Swedish Competition Act of 2008 and paragraph I.2 of Article L420-4 of the Commercial Code of France.

to unnecessarily distort competition in the market. One objective of competition policy is to ensure efficient and well-functioning markets, which are crucial in promoting innovation and new technologies. Therefore, it is recognized by some countries that efficient environmental policy requires strong competition policy implementation, which does not allow firms to abuse their market power or exclude competition in order to stimulate more innovation; does not approve anticompetitive mergers for the sake of innovation; and at the same time does not discourage horizontal or vertical cooperation between firms to engage in joint research and development and eco-innovation activities.[24]

23. In South Africa, competition policy was part of the reforms undertaken both to address the historical economic structure, where corporate ownership and control was highly concentrated, and to promote inclusive growth. Competition policy was considered important for improving the participation of black-owned companies in the economy.[25] The importance of competition was also highlighted in the Government's Accelerated and Shared Growth Initiative for South Africa.[26]

24. Further, the provisions on the criteria used to grant exemptions to certain business agreements or practices in the South African competition law reflect the complementarity of competition policy and industrial policy. Section 10(3)(b) of the Competition Act 1989 provides that an exemption shall be granted if the agreement or practice concerned contributes to: (i) maintenance or promotion of exports; (ii) promotion of the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive; (iii) change in productive capacity necessary to stop decline in an industry; or (iv) the economic stability of any industry designated by the minister, after consulting the minister responsible for that industry.

25. Similarly, competition policy was complementary to industrial policy in Japan and the Republic of Korea during their economic growth and development. In Japan and the Republic of Korea, competition law enforcement and competition institutions were closely linked to national industrial policy. The Republic of Korea Fair Trade Commission had close ties with the Economic Planning Board, of which it was a member until 1994.[27] Further, rivalry between firms was an important national strategy and was encouraged to achieve industrial development goals. This strategy had a substantial impact on the investment and production decisions of firms. Dynamic competition processes played a disciplining role and a role in promoting the competitiveness of large corporate groups in the Republic of Korea.[28] This shows the importance of competition policy in achieving the structural economic transformation needed to achieve sustainable development.[29]

Fair competition

26. Besides ensuring free competition, competition policy may also look into ways to strengthen fair competition. Competition laws aim to remedy anticompetitive practices but not necessarily unfair business practices. This is so especially with respect to contractual relationships between small and medium-sized enterprises (SMEs) and large businesses.

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[24] KE Johansen, 2008, Director General, Norwegian Competition Authority, *Sustainable Development and Competition Policy*, Presentation at the European Competition Day, Paris, 18–19 November, available at http://www.konkurransetilsynet.no/ImageVaultFiles/id_1460/cf_5/Sustainable_Development_and_Competition_Policy.pdf.

[25] S Roberts, 2004, The role for competition policy in economic development: the South African experience, Working Paper 8, Trade and Industrial Policy Strategies, available at http://crdi.ca/EN/Documents/The-Role-of-Competition-Policy-in-Economic-Development.pdf.

[26] S Roberts, 2010.

[27] S Roberts, 2004.

[28] Ibid.

[29] A/69/700.

The former may be vulnerable vis-à-vis the latter given the superior bargaining power of large businesses.

27. In an increasingly globalized world economy, developing countries and countries with economies in transition face many challenges. Production in many sectors is carried out through global value chains dominated by large multinational companies, their subsidiaries and subcontractors. Global value chains have been experiencing increased concentration through both horizontal and vertical mergers of large transnational corporations, or through takeovers by transnational corporations of smaller domestic companies. In these highly concentrated and vertically integrated global manufacturing sectors, local SMEs face the challenge of dealing with very large enterprises with strong bargaining power. Local SMEs do not have sufficient bargaining power and are therefore in a disadvantaged position to negotiate fair prices or contract terms and conditions for their products or services in vertical relationships with large firms.

28. Given that key exporters and their suppliers in global value chains are often transnational corporations, there are concerns that value added created by foreign affiliates in developing countries does not confer the same economic benefits as the value added created by local firms. This is because foreign affiliates may repatriate their earnings on the value added. Nearly two thirds of global foreign direct investment income was repatriated while one third was retained in host economies.[30] To some extent, the share may vary according to the type of global value chain involvement of foreign affiliates in host countries. Considering this, developing countries might want to protect their local SMEs from the abuse of bargaining power by big businesses. Competition policy may address this issue by focusing not only on free but also on fair competition and develop solutions for how to protect SMEs from the abuse of superior bargaining power by large domestic and transnational enterprises in such unbalanced relationships. This is very important for the fair sharing of benefits from globalization and realizing sustainable and inclusive growth and development.

29. Competition law and unfair competition law constitute two pillars of competition policy. Both are concerned with the protection of competition and may therefore be considered as part of basic competition legislation. Even though competition and unfair competition laws emphasize different aspects, that is, free and fair competition, respectively, their common feature is to promote competition. Competition can only function properly if it is free from distortion resulting not only from market failures but also from unfair business practices.

30. Abuse of bargaining power cannot be addressed by competition laws as it is different from abuse of market power. Abuse of bargaining power refers to a situation in which a party takes advantage of its superior bargaining position vis-à-vis another party and engages in unjust conduct compared to normal business practices, through acts including but not limited to: (1) setting or changing transaction terms in a way disadvantageous to the other party; (2) imposing a disadvantage on the other party regarding terms or the execution of transaction; (3) unfair and unduly long payment terms for supplied goods or services; (4) unfair and unjustified provisions concerning the return of goods; and (5) unfair discrimination.

31. In competition law, the abuse of dominant position requires a firm to have significant market power in the relevant market. This is a necessary but not sufficient condition to prove abuse. Different from abuse of dominance, abuse of bargaining power does not require a party to have a dominant position in the market, but it does require that it

[30] UNCTAD, 2013, *World Investment Report 2013* (New York and Geneva, United Nations publication).

have a superior bargaining position compared to the other party in a business relationship. According to a report by the International Competition Network, the criteria used by some countries to assess the abuse of a superior bargaining position include: (1) degree of trade dependence on the firm by the other; (2) probability of finding an alternative trade partner; (3) supply and demand forces of the product or service; (4) difference in scale of business between the parties; and (5) position of the abusing firm in the industry.[31] In terms of the market effect, if the requirements of position and conduct are satisfied, the relevant conduct violates the provision on abuse of superior bargaining position, tending to impede fair competition, rather than restraining competition in a specific market.

32. Due to the different criteria applied to assess cases of abuse of dominance and abuse of bargaining power in most cases, standard provisions in competition law fall short of addressing this issue. Therefore, an additional regulation or law that focuses on fair competition is indispensable, unless such situations are addressed by specific provisions under competition law. Fair competition would contribute towards inclusive growth and development by improving business conditions for SMEs and ensuring their fair participation in the economy.

B. Design of competition law

33. Competition law may be designed and implemented in such a way as to promote inclusive and sustainable growth and development. There are many interesting examples from various countries that address specific economic, social and historical issues through the appropriate design and effective implementation of competition law.

Fairness of competition

34. In countries where economic power is highly concentrated in the hands of a few corporate groups, competition law may promote the participation of underprivileged economic agents in the process of competition on one hand and establish the rules of fair and free competition on the other.[32] Japan and the Republic of Korea addressed this issue by including fair competition provisions in their laws and practices to protect the interests of smaller firms, especially in their subcontracting relationships with big businesses. In the Republic of Korea, the Monopoly Regulation and Fair Trade Act addresses imbalances in the bargaining power between parties by prohibiting "trading by unjustly using a superior bargaining position" (Article 23(1)4). In addition, the Republic of Korea Fair Trade Commission aims to ensure the fairness of transactions between large companies and SMEs by enforcing the Fair Transactions in Subcontracting Act, which has been in force since 1984. In this framework, the Republic of Korea Fair Trade Commission provides advice and assistance to SMEs in avoiding subcontracts with unfair commercial terms.

35. It is not only SMEs that may suffer from the superior bargaining power of large firms they deal with. A similar problem is faced by smallholder farmers in both developed and developing countries. This issue may be addressed by allowing farmers to organize themselves in cooperatives. Another approach might be to formulate specific provisions in competition law to deal with the abuse of buyer power. For this purpose, competition law must first of all include the protection of competition as an open process among its objectives. The conventional objective of protecting consumer welfare or interests might not be sufficient to justify any measure against the abuse of buyer power, which adversely

[31] International Competition Network, 2008, Report on abuse of superior bargaining position, available at http://www.internationalcompetitionnetwork.org/uploads/library/doc386.pdf (accessed 30 March 2015).

[32] S Roberts, 2010.

affects small agricultural producers but does not necessarily cause consumer harm.[33] In addition, for competition authorities to be able to prosecute the abuse of buyer power, competition law needs to prohibit the abuse of buyer power and provide criteria, similar to those for the abuse of dominance, on how to establish buyer power and assess whether there is abuse of such power.

36. However, it should be noted that cases that deal with the abuse of market power are very difficult to prove in practice. Therefore, remedying the abuse of buyer power by competition law should not be seen as the sole and best option. Other policies and mechanisms to eliminate such distortions and provide support to smallholder farmers should be put in place.

Public interest

37. Some competition laws include public interest provisions in sections on the objective of the law, exemptions and merger control. Such provisions give a certain degree of flexibility to the adjudicative body in evaluating the effect of the practice in question not only on competition but also on issues such as employment, the impact on the competitiveness of SMEs and market access and citizen empowerment. The Republic of Korea Monopoly Regulation and Fair Trade Act has "balanced economic development" among its objectives. The South African Competition Act states that its purpose is to promote and maintain competition in the country in order to promote economic development and employment; to advance the social and economic welfare of South Africans; to ensure that SMEs have an equitable opportunity to participate in the economy; and to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.[34] The last two objectives give the South African competition institutions a role to play towards achieving inclusive growth and development. Similarly, the Anti-Monopoly Law of China provides in Article 1 that one of the objectives of the law is to safeguard social public interest.

38. The competition laws of Botswana, China, Hungary, Namibia, Poland, South Africa and Zambia include public interest criteria in assessing the competitive impact of mergers.[35] Nevertheless, these public interest provisions are usually only secondary to the economic efficiency and competition impact analysis by authorities.

Exemptions

39. Many competition laws include exemptions to prohibited anticompetitive practices. These exemptions may be of a sectorial or non-sectorial nature. Section A of this note discusses agriculture as a sector that is subject to special treatment by competition and sectorial laws and regulations. Non-sectorial exemptions under competition law are granted to business agreements or practices, which would have the effect of ensuring economic progress, including the creation or retention of jobs, and would allow consumers a fair share of the resulting benefit, without giving businesses concerned the possibility of eliminating competition in a substantial part of the products market.[36]

40. The European Union provides for such an exemption from the prohibitions listed in Article 101(1) of the Treaty on the Functioning of the European Union. It provides that prohibitions in the latter do not apply to any agreement between firms "which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does

[33] UNCTAD, 2014.
[34] Article 2 of Chapter 1 of the Competition Act No. 89 of 1998 of South Africa.
[35] TD/RBP/CONF.8/L.3.
[36] TD/RBP/CONF.8/L.2.

not: (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question".[37] This exemption may apply to agreements in research and development that might result in innovation supporting environmental protection or agreements to promote the production and distribution of green products.

41. It may be argued that the way in which exemptions set out in competition law are interpreted and applied may also result in the prevention of agreements that would otherwise contribute to achieving sustainable development through better use of natural resources or environmental protection. This is because the balancing of possible consumer welfare loss resulting from such agreements on one hand and sustainable development gains to be achieved on the other might not be a straightforward exercise.[38] Therefore, authorizations and exemptions under competition law may be formulated and implemented in such a way as to provide for evaluating business agreements or practices with respect to their impact on sustainable development, including environmental protection, promoting ecological innovations or the production and distribution of green products, etc. This might require the substantial integration of social and environmental dimensions of sustainable development into competition law and a sustainable development perspective into the way the law is enforced.

C. Competition law enforcement and advocacy

42. Efficient and effective competition law enforcement deters, eliminates and sanctions anticompetitive practices in the market. This would promote competitive markets and enhance consumer welfare, since anticompetitive practices result in higher prices, lower quality and lesser choice for consumers. However, it is recognized that competition authorities, especially those in developing countries, have limited resources. Therefore, they need to use their resources in the most efficient way. Prioritization might be a good way to allocate resources efficiently.

43. Competition authorities may identify priority areas for enforcement based on their implications for sustainable and inclusive growth and development. Some competition authorities have set up a framework for enforcement prioritization. South Africa is a good example. In 2008, the South African Competition Commission identified prioritization criteria as part of its strategic planning process. One of these criteria is the impact on poor consumers. The Commission identified the following four priority sectors based on these criteria: food and agroprocessing; infrastructure and construction; banking; and intermediate industrial products. Similarly, the Competition Authority of Kenya aims to ensure access by poor people to basic goods and services at affordable prices. In the Republic of Korea, in response to threatening inflation in the aftermath of the global economic crisis, the Republic of Korea Fair Trade Commission set up a programme to monitor price fixing of key items, price hikes of which can severely impact households. Through this initiative, a number of cartels in instant noodles, eggs and gasoline markets were detected. Other competition authorities, such as those in Indonesia and Mauritius, focus their enforcement activities on sectors that provide the basic needs of people.[39]

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[37] Article 101 para. 3 of the Treaty on the Functioning of the European Union.

[38] A Gerbrandy, 2013, Competition law and sustainable development: An inquiry by legal essay, in ALBC Ciacchi, MA Heldeweg, BMJ van der Meulen and AR Neerhof, eds., *Law and Governance: Beyond the Public-Private Law Divide*, Eleven International Publishing, The Hague.

[39] TD/B/C.I/CLP/24/Rev.1.

44. In countries where agriculture plays an important role in the economy and in the lives of the poor population, the agricultural sector might be set as a priority sector for competition law enforcement. The sector often faces highly concentrated upstream and downstream segments of the supply chain. This has a substantial impact on smallholder farmers and the poor population, especially in developing and least developed countries whose revenues depend heavily on export crops, such as coffee, cotton, cocoa and tobacco. The downstream segment is characterized by the existence of only a few dominant firms that buy from smallholder farmers, thereby determining the farm-gate prices of such crops due to their oligopsony power. A World Bank study examines how the internal structure of export markets and the level of competition affect poverty and welfare in remote rural areas in Africa.[40] The study focuses on coffee, cotton, cocoa and tobacco in eight countries, namely Benin, Burkina Faso, Côte d'Ivoire, Ghana, Malawi, Rwanda, Uganda and Zambia. These crops are a major source of export revenue for these countries and are produced mostly by smallholder farmers. Therefore, the change in export prices of these commodities may play a significant role in improving farmers' livelihoods. The study concludes that more competition among processing and exporting firms is beneficial for smallholders. Further, it is observed that more competition boosts the positive effect of complementary policies, which aim to improve services and infrastructure affecting farmers and firms in the sector. This shows the importance of complementary and coherent policies in achieving sustainable and inclusive development goals.

45. The agricultural sector is also prone to anticompetitive practices in upstream markets for inputs such as fertilizers, seeds distribution and agrochemicals. These markets are globally highly concentrated in the hands of a few multinational firms. In the downstream market, there is a trend of consolidation of retailers on a global scale, which results in highly concentrated distribution and retail networks for agricultural products. Competition law enforcement and advocacy might play an important role in dealing with anticompetitive practices in these segments. Further, the less competitive nature of these oligopolistic markets may negatively affect agricultural producers and consumers, even in the absence of anticompetitive practices. Merger control regimes can be an effective tool to prevent the further consolidation of businesses in already highly concentrated input and processing markets. Further, any collusive practice or abuse of market power in these markets may be dealt with under the relevant provisions of competition law. An additional way to deal with this situation may be through additional regulations or policies that promote competition and new entry in distribution and retail markets.

46. Competition authorities may also use their advocacy power to support the design of pro-competitive State aid schemes in the agricultural sector. The UNCTAD study on Mexico's agricultural development, which focuses on competition issues in corn production and commercialization in Mexico, determined that the design of agricultural subsidy schemes favoured large corn farms compared to smallholder corn producers and therefore distorted competition to the detriment of the latter.[41] The study recommends putting in place pro-competitive State aid schemes, which would enable small corn producers to grow and compete successfully in commercial markets.

47. One of the challenges facing competition authorities in developing countries is that many multinational companies, including those in the agricultural sector, whose operations affect their markets, are from outside their jurisdictions. Therefore, one way to tackle this

[40] G Porto, ND Chauvin and M Olarreaga, 2011. *Supply Chains in Export Agriculture, Competition and Poverty in Sub-Saharan Africa*, Centre for Economic Policy Research and World Bank.

[41] UNCTAD, 2014.

extraterritoriality issue may be to consider the application of regional competition rules, such as in the European Union and the Common Market for Eastern and Southern Africa.[42]

48. Prioritization by competition authorities should be coherent with other government policies and should be informed by other relevant government institutions, particularly those responsible for economic, trade and social policies, including employment, health, education, youth, gender and minorities and environment policy, if it is to contribute to sustainable and inclusive growth and development.

49. Another way in which competition authorities may contribute to sustainable and inclusive development is by influencing policymaking through competition advocacy. Competition authorities should cooperate with other government bodies to ensure that regulations or policies do not violate competition principles in a way that would impede the achievement of sustainable development.

50. The example of environment policy may be considered. One of the goals of environmental policy is to curb greenhouse gas emissions. One way to achieve this goal may be the development of a market for emissions trading. Such an emissions trading system was launched in the European Union in 2005. These markets, as do others, may witness collusive practices both by buyers and sellers, which might reduce the efficiency of markets and distort price signals. Therefore, competition authorities should take an active role in the design and functioning of these markets to ensure their efficiency and avoid collusive behaviour.[43]

51. Competition authorities may also look into public procurement policy and advocate for a transparent and competitive procurement process to avoid the waste of public resources by bid-rigging practices, inflated bids and corruption. Public procurement represents, on average, between 13 and 20 per cent of gross domestic product worldwide and is therefore significant in terms of allocation and use of public funds, i.e. taxpayers' money.[44] Bid-rigging increases the prices a government pays to goods and services providers. Therefore, competition law enforcement is crucial in detecting and preventing bid-rigging cartels in public tenders. This would allow government revenues to be used efficiently and fairly and even spare resources that may be used to achieve sustainable development goals.

52. In 2006, the Mexican competition authority identified collusion in the public procurement process of the Mexican Institute of Social Security in public tenders for human insulin and electrolytic solutions between 2003 and 2006. The Institute is the third largest public purchaser in Mexico and the largest single buyer of pharmaceuticals and medical supplies in Latin America. In January 2010, the authority imposed a fine of Mex$ 151.7 million on the bid-rigging cartel of six pharmaceutical companies. After implementing the authority's recommendations for making the procurement process more competitive, including by consolidated purchases, reverse tendering, reduced reference prices and opening of bidding procedures to international suppliers, the Institute saved approximately Mex$ 46 billion between 2006 and 2011.[45]

53. In conclusion, competition policy is complementary to other government policies. Therefore, it should not be developed in isolation from the economic, social and environmental realities and needs of a country. Competition policy and law could address challenges faced in these areas and, when appropriately designed and effectively

[42] TD/B/61/2.

[43] KE Johansen, 2008.

[44] Organization for Economic Cooperation and Development, 2013, available at http://www.oecd.org/gov/ethics/meetingofleadingpractitionersonpublicprocurement.htm.

[45] TD/B/C.I/CLP/27.

implemented according to the circumstances of a country, they may contribute to sustainable and inclusive growth and development.

III. Questions for discussion

54. Suggested questions for discussion include the following:

(a) Should competition laws integrate objectives to achieve sustainable and inclusive growth and development?

(b) How can competition policy and law be designed and implemented in a way that promotes sustainable and inclusive growth and development?

(c) What kind of provisions need to be incorporated in competition laws to address the abuse of buyer power, to ensure fair competition?

(d) What mechanisms can be put in place to deal with the abuse of bargaining power in order to promote fair competition in the market?